

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 83-2864(SA)

ANTONIO CIPOLLONE, individually,
and as Executor of the Estate
of Rose D. Cipollone,

Plaintiff,

-vs-

LIGGETT GROUP, INC., a
Delaware Corporation; PHILIP
MORRIS, INCORPORATED, a
Virginia Corporation; and
LOEW'S THEATRES, INC., a
New York Corporation,

Defendants.

:
:
: TRANSCRIPT OF
: PROCEEDINGS
:

: Newark, New Jersey

: April 18, 1988
: MORNING SESSION
:

B E F O R E:

HONORABLE H. LEE SAROKIN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

BUDD, LARNER, GROSS, PICILLO, ROSENBAUM,
GREENBERG & SADE, ESQS.,
BY: MARC Z. EDELL, ESQ.

-and-

WILENTZ, GOLDMAN & SPITZER, ESQS.,
BY: ALAN M. DARNELL, ESQ.,
Attorneys for the Plaintiff.

ARNOLD & PORTER, ESQS.,
BY: PETER K. BLEAKLEY, ESQ.,
BY: THOMAS E. SILFEN, ESQ.

Attorneys for the Defendant, Philip Morris.

Pursuant to Section 753 Title 28 United States Code,
the following transcript is certified to be an accurate
record as taken stenographically in the above-entitled
proceedings.

Joanne M. Houston, CSR

PHYLLIS T. LEWIS, C.S.R.
Official Court Reporter - United States District Court
P.O. Box 25588, Newark, New Jersey 07101

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PHYLLIS T. LEWIS, CSR & JOANNE M. HOUSTON, CSR

1
2 A P P E A R A N C E S: (Continued)

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4 BERGSTEIN, ESQS.,

5 BY: ALAN S. NAAR, ESQ.,

-and-

6 WEBSTER & SHEFFIELD, ESQS.,

7 BY: DONALD J. COHN, ESQ.,

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10 STRYKER, TAMS & DILL, ESQS.,

11 BY: WILLIAM S. TUCKER, JR., ESQ.,

-and-

12 SHOOK, HARDY & BACON, ESQS.,

13 BY: STEVEN PARRISH, ESQ.,

ROBERT E. NORTHRIP, ESQ.,

PATRICK M. SIRRIDGE, ESQ.

14 Attorneys for Defendants,

Philip Morris and Lorillard.

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1 APRIL 18, 1988

2 THE CLERK: Remain seated.

3 (The following takes place out of the presence of
4 the jury.)

5 THE COURT: Good morning.

6 MR. BLEAKLEY: Good morning, Judge.

7 MR. EDELL: Good morning, your Honor.

8 THE COURT: I wanted to spend a few minutes with
9 you, and this question is not meant to mean I've resolved
10 all the other issues, but there is one question that I have.
11 I worked on the briefs over the weekend -- and I guess it's
12 really directed to Liggett, Mr. Cohn or Mr. Kearney. It's
13 on the duty to warn question and let me see if I can put it
14 simply.

15 Is it the contention of Liggett that there was a
16 duty to warn, but that you are relieved of that duty because
17 of the knowledge Mrs. Cipollone and the general public had
18 or do you contend that there was no duty to warn pre-'66?

19 MR. COHN: No duty to warn, your Honor.

20 THE COURT: Let me tell you the problem I have with
21 that.

22 Can you say that it was sufficient information out
23 there for the public and Mrs. Cipollone to have been aware
24 of the dangers, but that same information did not impose a
25 duty to warn upon Liggett? Isn't that factually

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1 inconsistent?

2 MR. COHN: No, your Honor, because you have a
3 situation where, since the inception of its use, tobacco has
4 been a matter of controversy, which is in the record and the
5 claims with respect to cigarette smoking have changed over
6 the years. But I think it's always been in the public
7 awareness that there was a substantial number of people, a
8 substantial body of information that said at least smoking
9 is not good for you, it was bad for your health.

10 This was just associated with smoking since its
11 inception.

12 THE COURT: Assuming that. But what does that mean
13 insofar as Mrs. Cipollone?

14 MR. COHN: As the information developed about
15 specific areas, this was added to the claims being made,
16 kind of a rolling situation. Certainly Liggett read about
17 it, anybody else did. There has never been any question
18 about that. And this was the kind of consumer awareness
19 that we believe is --

20 THE COURT: Isn't there a predicate? We're talking
21 about assumption of risk. Isn't there a predicate to
22 that --

23 MR. COHN: Not really.

24 THE COURT: -- that the information has to be
25 sufficiently reliable for her to have been warned? Can you

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1 say that for her it was sufficiently reliable so that she
2 should not have smoked, but it was not sufficiently reliable
3 for you to have been required to warn?

4 That's the problem I have.

5 MR. COHN: I see. I don't think it has something
6 to do with assumption of risk, I think it's duty to warn.
7 The whole point is that you look at what is the information
8 that is available to consumers. Were they aware that there
9 were risk involved? That is the focus under duty to warn,
10 not whether any particular consumer -- how they reacted.

11 THE COURT: Generally, what's the contention, that
12 she or consumers in general knew enough so they should not
13 have smoked, right?

14 MR. COHN: No, no, your Honor. Not -- that's the
15 point. You're starting with a premise that the only
16 information that would have been sufficient is if nobody
17 smoked. That's not the case. The question is people made
18 choices, they still do.

19 THE COURT: Wait a minute. You're not helping me,
20 Mr. Cohn.

21 The contention is from your client that because
22 Mrs. Cipollone knew of the risk and smoked anyway, you
23 cannot be held liable. Isn't that a simple statement?

24 MR. COHN: Yes.

25 THE COURT: Okay!

P1T 003022

1 MR. COHN: But I'm trying to say is not assumption
2 to risk. Right now we're talking about at the end of the
3 plaintiffs' case, we're talking about whether there was a
4 duty to warn pre-'66.

5 THE COURT: Yes. But if you take the factual
6 position that there was enough information out there, which
7 should have caused her not to smoke, without the tobacco
8 companies doing anything, can you say that that information
9 was not sufficient to require them to warn her?

10 MR. COHN: Your Honor, it's not our position that
11 there was -- that we have to show that there was enough
12 information out there that caused her not to smoke. That's
13 an individual decision. The point is that there was enough
14 information out there that Mrs. Cipollone was aware of the
15 risks, of the claims about cigarette smoking and health and,
16 therefore, we had no duty to warn. It has nothing to do,
17 under our approach, whether it caused her to stop smoking or
18 not.

19 THE COURT: We're not talking causation. What I
20 want to know, this is a very specific, precise question. If
21 you say that she was aware enough not to smoke, isn't that
22 same awareness, assuming that your client knew or should
23 have known what she knew, enough to require that there be a
24 warning?

25 MR. COHN: No, your Honor, because I think where we

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1 part company -- and this is what I have been trying to say,
2 I don't think our claim is that the information was
3 sufficient to cause her not to smoke. That's where we part
4 company.

5 It's the information was sufficient so that the
6 consumers had a general awareness of the risks. Whether
7 they stopped smoking is up to them.

8 THE COURT: But what is -- but the knowledge.

9 MR. COHN: I think this is important.

10 THE COURT: We're not talking about conduct. We're
11 talking only about her knowledge. If her knowledge was
12 sufficient, isn't the sufficiency of that knowledge such
13 that it would -- is the equivalent of a duty to warn?

14 MR. COHN: No, your Honor, because if there is
15 general awareness of sufficient knowledge, there is no duty
16 to warn.

17 THE COURT: But that's what I started to ask you.
18 In other words, is it your position, yes, we had a duty to
19 warn, but because everybody knew about it, we're released of
20 that duty to warn?

21 MR. COHN: Well --

22 THE COURT: Isn't that different?

23 MR. COHN: I don't see the difference. Our
24 position is that there was no duty to warn because of the
25 general awareness of the knowledge.

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1 THE COURT: Well --

2 MR. COHN: Not that we were relieved of it, but
3 there was no duty to warn. It may be semantic, your Honor,
4 but that's our position.

5 THE COURT: Maybe it is.

6 Do you concede, though, that if you contend that
7 the consumer knew enough about the risk, that the same
8 information which conveyed the risks to the consumer would
9 provide a requirement that there be a duty to warn?

10 MR. COHN: No, your Honor.

11 THE COURT: How can that be?

12 MR. COHN: Because it obviates the duty to warn.

13 THE COURT: Relieves it, but absent that you would
14 be under a duty, right?

15 MR. COHN: No, your Honor. If there is a general
16 consumer awareness of the risks, you don't have to warn.

17 THE COURT: That's a legal matter.

18 Factually speaking, the knowledge would be
19 sufficient to require the warning, would it not?

20 MR. COHN: I'm having trouble following your
21 Honor's question.

22 THE COURT: If the -- if your client had the same
23 information that you contend that the consumers had.

24 MR. COHN: We don't dispute that.

25 THE COURT: All right. Would that information,

1 absent the fact that the consuming public knows about it, be
2 sufficient to require you to give a warning?

3 MR. COHN: And the consumers knew nothing about it?

4 THE COURT: Right.

5 MR. COHN: Well, I think then it depends on what
6 point of time you are.

7 THE COURT: That's at any point of time you say the
8 consumers knew. If you had that same knowledge, would you
9 not be under an obligation to warn?

10 MR. COHN: Well, there again, your Honor, I can
11 only say it depends. It depends upon where you are in this
12 period of time. But I understand your hypothetical is that
13 nobody else in the world knew about it except the
14 manufacturers?

15 THE COURT: Let's take it that way, if that makes
16 it easier for you.

17 MR. COHN: If the manufacturer has information
18 which nobody else knows, and if everybody else knew it, he
19 wouldn't have to warn, one could, I think, make the
20 argument, yes, there was a duty to warn. But that's not the
21 case here. The case here is that this information was
22 available to everybody, it developed in a rolling kind of
23 way and plus the fact, I think it's important to get back to
24 what I said earlier on, which is that these claims have been
25 associated with cigarette smoking -- not cigarette smoking,

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1 the use of tobacco from its very beginning, so this was
2 ingrained in the knowledge.

3 THE COURT: From a legal point of view, what you're
4 saying, Mr. Cohn, I thought that this was your client's
5 position: That unless you can establish -- and we're now
6 talking about the defendant Liggett -- that Mrs. Cipollone
7 or the public in general knew of these risks, you concede
8 you would have a duty to warn but your contention is that
9 you're relieved of that duty to warn because the public knew
10 about it?

11 MR. COHN: No, your Honor. Our position is that
12 it's -- we don't have to prove that. We believe that it's a
13 part of the plaintiffs' case to show that there was not
14 sufficient consumer awareness. This is an affirmative point
15 of his case. That's why I said we're not talking about
16 assumptions of risks. We're talking about the plaintiffs'
17 case, what the plaintiff has to prove. The plaintiff has to
18 prove that there was not this kind of general awareness,
19 because only until he proves that, does a duty to warn
20 arise.

21 THE COURT: Any cases put that burden on the
22 plaintiff?

23 MR. COHN: Sure, that's what they all say.

24 THE COURT: Plaintiff has to prove that people
25 generally did not know about the risks?

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1 MR. COHN: I believe so, your Honor.

2 THE COURT: Mr. Kearney, you want to help out here?

3 MR. KEARNEY: I can't help out because I think Mr.
4 Cohn has stated the position as succinctly and clearly as
5 one can.

6 MR. COHN: I think I understand you.

7 MR. KEARNEY: The duty is to put out a
8 non-defective product. Plaintiff must prove that the
9 product was defective, in this case defective because there
10 was a failure to warn. He must prove in order to prove it's
11 a -- it was a defective product, he has to prove that there
12 was a duty to warn.

13 The statute makes crystal clear, the product
14 liability statute and Comment I, that in a situation where
15 you have a product, characteristics of which are part of the
16 ordinary consumer knowledge, there doesn't arise -- put it
17 two ways, a duty to warn, it doesn't -- the product is not
18 determined to be a defective product. So it is plaintiffs'
19 burden to demonstrate that this was a defective product for
20 failure to meet a duty to warn. In order for a duty to rise
21 he has to demonstrate that. And it's clear from the
22 statute, your Honor, he's got to demonstrate that there was
23 not ordinary knowledge, common to the community about the
24 same risks.

25 We're in a very interesting situation, probably

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1 unlike a lot of products and I cite one piece of evidence is
2 the Wynder mouse skin paintings. There, as soon as the
3 results came out, to the manufacturer's knowledge, December,
4 1953, as your Honor saw, it was in Time magazine, it was in
5 Reader's Digest and it was in the New York Times.

6 So it's quite clear that the duty never arises
7 certainly with respect to that, just to use that as an
8 example, because it was a matter of common knowledge,
9 ordinary to the community. So it's our position that, first
10 of all, you have to establish a duty. Then there has got to
11 be a breach of duty, then you get to causation. Plaintiff
12 must prove, as your Honor has said, that a warning had been
13 given would have prevented the smoking, either stopped it or
14 prevented her from starting. Those are all burdens before
15 you get to assumption of risks.

16 THE COURT: Okay. I understand your position.

17 Let's bring in the jury.

18 Anything else before we start?

19 MR. EDELL: I thought maybe we'd take this up so we
20 avoid a sidebar, your Honor, with regard to the next
21 witness. If you want to do it at sidebar, we can. We're
22 going to be relatively short with Professor Kassarian.

23 THE COURT: What's the problem?

24 MR. EDELL: Over the weekend we received some of
25 the exhibits that -- this deals with Mr. Sirridge -- some of

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1 the exhibits that the defense intends to use with their next
2 witness, Dr. Sommers.

3 Dr. Sommers is the scientific director of the
4 Council for Tobacco Research as well as an expert witness on
5 the issue of causation, both generally and specifically
6 concerning Rose Cipollone. He's a pathologist and will give
7 certain opinions concerning the type of tumor that Rose
8 Cipollone had.

9 In going through the exhibits, I noted that there
10 is a substantial -- it appears a substantial fraction of Dr.
11 Sommers' testimony will deal with the period post-1981. We
12 have been -- we had been foreclosed from conducting
13 discovery of the Council for Tobacco Research of the
14 defendants concerning the Council for Tobacco Research as
15 well as specifically the deposition of this witness,
16 post-1981. Therefore, any testimony from this witness
17 concerning the Council for Tobacco Research, its activities,
18 what they did, what they didn't do, how their research may
19 or may not be relevant to the issue of cigarette smoking and
20 health, I would suggest post-1981 should not be permitted,
21 since we have no way to attack the credibility of the
22 witness for the veracity of the witness concerning any such
23 statements.

24 I want to make that clear on the record right now.
25 And if your Honor wants, I can show you the objections posed

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1 by counsel of the deposition of Dr. Sommers instructing the
2 witness not to testify concerning post-1981, even to the
3 point where I asked him in this case did he ever make any
4 recommendations to the defense counsel concerning witnesses,
5 the objection was that was post-1981, I direct the witness
6 not to answer the question.

7 So clearly, if, for example --

8 THE COURT: Was there a ruling by the magistrate on
9 that?

10 MR. EDELL: The magistrate restricted the time
11 parameters in the discovery to 19 -- well, beginning of
12 1982, pursuant to the request of the defendants in this
13 case. We, for example, were furnished with 1986 Council for
14 Tobacco Research annual reports. Now, I never got that in
15 discovery. I got that this weekend from Mr. Sirridge.

16 If this witness is going to come in and say, here,
17 for example, is our 1986 annual report, this is relevant to
18 cigarette smoking and health, I have no way of attacking
19 that, Judge. I have a way of attacking the pre-19 --

20 THE COURT: Let's find out if there's a problem.

21 Are you using anything?

22 MR. SIRRIDGE: I think I can adjust whatever I'm
23 planning to present and not be in a position -- let me
24 finish.

25 THE COURT: All right. I thought I was starting

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1 off the week with a concession.

2 MR. SIRRIDGE: You thought you were on a roll.

3 What I do want to say is Mr. Edell did inquire into
4 certain factual things about Dr. Sommers, whereabouts in his
5 activities during the period up to the present day as to
6 what his position is and what he's been doing and all that
7 sort of thing, aside from the CTR activities per se. So I
8 certainly would not be precluded from --

9 THE COURT: No.

10 MR. EDELL: I don't mean to suggest that the
11 witness can't tell us that he he retired in 1981, is
12 director of Lenox Hill and after that became scientific
13 director of the Council for Tobacco Research. But as to
14 what he has done in that capacity, from a factual
15 perspective, I would object to because I was foreclosed from
16 conducting discovery.

17 THE COURT: Do you agree, Mr. Sirridge?

18 MR. SIRRIDGE: There is a period where he was
19 scientific director and he can talk about what his
20 responsibilities and duties and all that sort of thing were.
21 But if Marc is going to object to scientific reports
22 post-1981, we'll just work around that.

23 MR. EDELL: Or not just reports, your Honor, or
24 testimony pertinent to the activities of the Council for
25 Tobacco Research post-1981.

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1 MR. SIRRIDGE: I don't think it will be a
2 significant problem. And if for some reason there is an
3 objection to certain things, it can be worked out very
4 briefly at sidebar.

5 THE COURT: I take it that there is a concession if
6 you're going to offer anything post-81, just call for a
7 sidebar before you ask the question.

8 Bring them in. Let's make this a productive week.

9 THE CLERK: All rise.

10 (The following takes place in the presence of the
11 jury.)

12 THE COURT: Please be seated.

13 Good morning. I hope you all enjoyed this
14 wonderful weekend.

15 We're ready to resume.

16
17 D R. H A R O L D H. K A S S A R J I A N, previously
18 sworn, resumes the stand.

19 THE COURT: You're still under oath.

20 THE WITNESS: Yes.

21 THE COURT: You understand you're under oath?

22 THE WITNESS: Yes, I'm under oath.

23
24 CROSS-EXAMINATION CONTINUES

25 BY MR. EDELL:

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1 Q Did you stay the weekend here in New Jersey?

2 A In town, yes.

3 Q Professor, content analysis is and has been an accepted
4 tool, research tool in the area of consumer behavior for
5 many years now. Is that correct?

6 A It's been around for 15 years, yes.

7 Q And it's an accepted tool of research -- accepted
8 research tool in the field of consumer behavior?

9 A Yes and before that in sociology and communications
10 research from the 1940s.

11 Q You, yourself, have written a number of papers in the
12 area of consumer behavior dealing with content analysis. Is
13 that correct?

14 A Yes, I have.

15 Q Now, I read over some of the transcript of the testimony
16 on Friday and you were discussing the effect of advertising
17 on consumer behavior. And you indicated, for example, that
18 the family influence is more important than advertising and
19 you gave the example of a child eating cereal as a result of
20 parental influence. Is that correct?

21 A Yes.

22 Q But, for example, my six year old comes to me and says,
23 dad, I want Count Chocula cereal, he doesn't do that because
24 of parental influence, he does it because he's watching the
25 TV on a Saturday morning and Count Chocula comes on

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1 television, correct?

2 A Yes, that's possible. That's why the parent is the gate
3 keeper. But that's not the the point I was making. The
4 point I was making is that in the influence process there
5 are many, many vectors that come in. Advertising, of
6 course, is one of these.

7 But far more important are other mass media
8 communications, books you read, what your friends do, peers
9 do, the enormous pressure within the small group to do
10 something or not do something.

11 Q Let me give you another example and I do this because my
12 children do play with toys and they eat cereal.

13 For awhile there, there was a tremendous fad of
14 using Gobots. I don't know if you know about Gobots.
15 They're little robots that turn into cars and other things.
16 They were advertised on TV. Before they were advertised on
17 TV, none of the kids used Gobots. Now, my parental
18 influence didn't have an influence on their using Gobots; it
19 was advertising on television. Is that fair?

20 A Oh, no. Advertising may be there, but it's also what
21 the other kids are doing.

22 Q How do they find --

23 A What the group is doing.

24 Q How do they find out about it? They read the newspaper?

25 A No. It happens. To go back and say what causes what is

P1T 003035

1 awfully, awfully difficult. We just can't do that. I don't
2 want to take away the power of advertising. On the other
3 hand, I don't wanted to give it any more credit than it's
4 due. People think that the consumer is stupid and somehow
5 he's driven and pushed by ads and that just isn't so.

6 Q I'm not talking about driven and pushed, but the
7 consumer's influenced. That's why if a child sees Count
8 Chocula they may want to use Count Chocula cereal. Is that
9 correct?

10 A Well, but you want to give the credit to advertising and
11 I'm just saying, all right, maybe on some cases. Although,
12 I must admit that when I was with the FTC, I just felt
13 strongly that some of the movement towards controlling
14 children's television advertising was just a little bit to
15 zealot. It just doesn't have that kind of power.

16 Q Let's talk about symbols.

17 Symbols in terms of advertising is a very important
18 aspect of consumer behavior. Is that correct, sir?

19 A By symbol, you mean something like a logo. You don't
20 mean the word sign and symbol as in psycholinguistics. Am I
21 right on that?

22 Q Symbiotics. We don't have to get into that.

23 A You don't want. Okay.

24 We're talking about a logo, "I'd walk a mile for a
25 Camel." Is that what you mean?

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1 Q Let's talk about something like the Marlboro man.

2 The Marlboro man is the result of advertising,
3 correct, the image of the Marlboro man. When we think about
4 it, that image is as a result of advertising, not family
5 influence or peer group pressure?

6 A No, that's an example of image change. It's a very good
7 example of image change, how a feminine cigarette became a
8 masculine cigarette. I don't know what else the company
9 did. We do know the change occurred. Whether that's
10 advertising or something else, I just don't know.

11 Q Professor Wilke, for example, in his book, uses the
12 change from Marlboro cigarettes being a feminine cigarette
13 to the Marlboro cigarette that we think of today as a very
14 effective advertising campaign that resulted in this symbol
15 or image of the Marlboro man. Isn't that correct?

16 A I suspect that's quite correct.

17 The problem with it is that there are an enormous
18 number of terrible failures where a lot of advertising
19 dollars have been spent and so we don't know why that
20 occurs.

21 For example, corfan by DuPont is a classic failure.
22 They spent millions trying to get people to use a product
23 that is superior to leather, never needs shining, they made
24 shoes out of it, expensive shoes, superior to leather. They
25 breathed better. All the things leather did, this product

P1T 003037

1 did better and it just failed.

2 Millions were spent on another very classic is the
3 Edsel. Not only advertising and PR, but hundreds and
4 hundreds of dealerships were set up at costs of gosh,
5 millions, billions -- what do I know -- and failed.

6 Q I'm not going to argue with you. There certainly are
7 business failures in terms of advertising.

8 A And there is some successes and we don't know, is it
9 advertising? We don't know.

10 Q Let me ask you this: When we think of Virginia Slims,
11 for example, do we have an image in our mind? Sure, the
12 Virginia, it's a women's cigarette, right?

13 A Yes.

14 Q The tobacco is the same, paper is the same, filters the
15 same, maybe put together different and advertised
16 differently, but we think of it as a women's cigarette and
17 that's a result of advertising. Isn't that correct?

18 A Advertising is part of it. I don't know if there is
19 anything else.

20 You can't get me to say that advertising doesn't
21 work.

22 Q I want you to say?

23 A You can't get me to say advertising is a God send. If
24 it were, we could steal anything.

25 Q And when we get away from brand advertising, let's talk

1 about advertising in general.

2 Does advertising have an effect on our values, on
3 societal values?

4 A No, no. That's getting pretty strong.

5 Q You don't think so?

6 A Maybe, just maybe if we want to believe that ring around
7 the collar is a terrible -- a societal value, it may have
8 some effect on something like that, but I don't think with
9 advertising we're going to reduce racial prejudice. I don't
10 think with advertising we're going to increase world
11 understanding or other major massive value systems. I don't
12 think so.

13 Q But advertising can reinforce certain social values, can
14 it not, sir, broadly speaking? I'm not talking about ring
15 around the collar. Broadly speaking?

16 A I understand what you're saying and I hate to say no,
17 because I suppose. I suppose it can.

18 On the other hand, I sure hate to say yes, that
19 advertising can reinforce or support major social values.
20 If I'm not prejudiced, if I see ads that say don't be
21 prejudice, that's going to help me remain unprejudiced?

22 That's a tough one. I don't think so, but it's a
23 tough one.

24 Q Let's talk about cigarette smoking.

25 Isn't it correct, sir, that cigarette advertising

P1T 003039

1 has the effect of reinforcing the social acceptability of
2 cigarette smoking?

3 A No, no, no, no. If we're going to get something
4 specific, then I don't believe so, because if that were the
5 case, the fact that so many people have stopped, tens of
6 millions, the fact that the enormous amount of pressure
7 against people smoking -- it's getting very difficult for a
8 person who smokes to continue smoking. There are no smoking
9 signs everywhere and advertising is there and the world is
10 beating the advertiser down. It's beating it.

11 Q I am not saying that advertising is stronger than
12 anything else in the world, but it does -- we don't know
13 whether or not advertising in terms of reinforcing the
14 social acceptability of cigarette smoking is making it more
15 difficult for all of the other forces to detract of the
16 acceptability of cigarette smoking, you can't measure it?

17 A No. I never thought of it that way. It's pretty
18 far-fetched that advertising -- that smoking is going
19 downhill very fast. If advertising were not there, it would
20 go downhill even faster? Maybe.

21 Q You were --

22 A I doubt it. Maybe.

23 Q You were here for some of the examination of Professor
24 Martin?

25 A Yes.

P1T 003040

1 Q You were here for most of it?

2 A I was here Friday. I don't -- was I here Thursday? I
3 don't remember, but I was here Friday.

4 Q And I posed a couple of hypotheticals to Professor
5 Martin and I would like to pose one to you.

6 A Sure.

7 Q Let us assume tomorrow these three companies, tomorrow,
8 Liggett, Lorillard and Philip Morris take a full-page ad out
9 in The New York Times, 480 other newspapers through the
10 United States, Life Magazine, Time, Newsweek, and it was a
11 frank statement to smokers: Cigarettes kill. We have
12 finally decided to tell the truth. For 30 years now it has
13 been proven that cigarette smoking causes lung cancer, heart
14 disease, emphysema and many other fatal diseases. Our
15 products kill over 350,000 Americans every year.

16 Do you think that would have an effect on the
17 information environment?

18 A It would be pretty dramatic. We don't expect to see
19 that. We expect to see other sources saying cigarettes kill
20 and we expect to see the manufacturers saying, no or we are
21 not sure. That is what we expect them to say.

22 When they come out with unexpected information I
23 think it will be discussed. I think if that occurred,
24 people would talk about it, and advertising is not something
25 we pay much attention to. But I think in this case it would

P1T

003041

1 be noted because it is not expected. It is an unexpected
2 kind of thing. Would it make people more aware because that
3 was wrong -- see --

4 Q I am asking you.

5 MR. BLEARLEY: Excuse me. I think the witness
6 should be allowed -- he posed a long complicated hypothetical
7 and I think the Doctor should be allowed in his own words to
8 respond to the question without interruption.

9 Q Go ahead.

10 A If we have a scale, do not believe that cigarettes kill
11 or very, very dangerous, some words like that, do believe it
12 on a scale, and what we call is a population way over here.
13 They know in my lay opinion, if not professional opinion,
14 they know cigarettes are bad for you. People know that. So
15 what we do, we put in some dramatic advertising that people
16 notice, cigarette companies, cigarette companies say,
17 cigarettes kill.

18 Would that take this person way over here on the
19 knowledge and push it over just a notch more so they know
20 even more, I don't know, maybe.

21 Maybe, but surely from an expert or professional
22 point of view, we have no evidence for it. But from a lay
23 point of view you think it would push it over unless they
24 are so far over there is not much room, not much place to
25 go.

P1T 003042

1 Q If you were being consulted by a manufacturer of a
2 product, and that manufacturer discovered that its product
3 did in fact cause lung cancer, heart disease and other fatal
4 diseases, and was killing 350,000 Americans ever year, how
5 would you advise that company to communicate those facts to
6 consumers in the most effective means possible so that the
7 consumers had an in-depth appreciation of the nature and
8 extent of the potential hazard, not talking about
9 cigarettes, just talking about a product?

10 A It would be different I guess if I were hired by the
11 American Cancer Society or Lung Association.

12 Q They don't make products.

13 A If I were hired by the other side, let me put it that
14 way, then I think that is one answer. If you are hired by
15 the company to put on the information, then I think that is
16 another answer. You don't have to do so much if you are the
17 company. If you just say our product is dangerous, you said
18 a whole lot because you are the company.

19 Q Why is that?

20 A Because people don't expect companies to say use our
21 product because we need the profits because it is going to
22 kill you. You don't expect companies to say it. When they
23 say it a little, our product is bad for you, it's very
24 dramatic it will be noticed.

25 So, you don't have to be quite as strong if you are

P1T 003043

1 the company than if you are some other outfit, the American
2 Cancer Society trying to get the same message across.

3 Q When you are talking about a manufacturer discussing the
4 potential hazards of its product the consumer does not
5 expect the manufacturer to talk about it, is that correct?

6 A Doesn't expect the manufacturer to come out and say our
7 product will kill you.

8 Q When a manufacturer does, such a statement has high
9 credibility concerning that potential hazard, isn't that
10 right?

11 A Don't know about credibility. That I don't know about
12 it. What it will do, it will be noticed. It had been
13 noticed.

14 Q Have more of an impact?

15 A I don't want to use those words because we have no
16 evidence for it. I don't know of any studies that have been
17 done on it.

18 All I know, and again not as an expert but as a
19 layman, I know when you see something dramatically different
20 than what you expect, you notice it. When you see a color
21 ad in a black and white newspaper it's more easily noticed.
22 When you see a black and white T.V. ad, which they do on a
23 television set, we look at it immediately because we wonder
24 if our set went out or if something else is wrong.
25 Something dramatically different is noticed. That is all.

P1T 003044

1 Q You told the jury and the Court that there are a number
2 of consumer behavior models to look at and analyze consumer
3 behavior. One of them was cognitive dissonance and you said
4 there were numerous others.

5 Isn't it a fact that you think that the consumer
6 model that you think applied to cigarette smoking is the
7 addiction model?

8 A I don't know anything about addiction. I never read
9 anything about addiction. I know nothing about addiction.

10 I think to have addiction, I don't know anything,
11 but it seems to me to be addicted means you have to have
12 withdrawal symptoms. I have no idea if one has withdrawal
13 symptoms from smoking.

14 Q Page 117 of the deposition, line 6.

15 Question: Do you have an opinion as to which of
16 these various theories you believe would best be used in
17 understanding consumer behavior with regard to cigarette
18 smoking?

19 Answer: Deep in my belly, I suspect a
20 physiological theory which probably hasn't been invented yet
21 will probably come pretty close. That it will have
22 physiologic reactions rather than social, psychological or
23 psychiatric reasons.

24 I think there is a physiological basis for
25 addiction here and I don't think we have that theory yet.

P1T 003045

1 If you want to know what I think will some day emerge, I
2 think we will see physiological research emerging but that
3 is not my field. In fact, I almost failed zoology.

4 A Yes. That is Page 117?

5 Q Yes.

6 A If you look at page 118, I happen to remember it
7 because -- I also say this is a philosophical position, that
8 isn't the important point.

9 The reason I remember that clearly I had to read it
10 because when it came in to make sure it sounded okay, when I
11 looked at it, I thought, oh, my goodness, somebody is going
12 to misunderstand and, oh, my goodness, they did.

13 Let me tell you my gut lay reaction to behavior.
14 We have no end of theories. We have Freudian theory that
15 says everything is sexually-based.

16 We have learning theories that say man is nothing
17 more than a salivating dog. If you give him a shock you
18 will go out and buy Folger's coffee.

19 We have psychological theories that say it is the
20 influence of the group, and views that say the culture is
21 important.

22 I think in the long run, 100 years down the road,
23 100 years down the road as we get much more advanced in the
24 field, we will be eventually reducing all of our behavior to
25 physiological, neurological kinds of response.

P1T 003046

1 I thought a lot, for example, about a very simple
2 thing, if I think to myself I think I shall move my finger
3 and thereafter I move my finger, that is a very difficult
4 thing for any theory to explain.

5 Freud, Lobito can't explain it and Pavlov's dog
6 with his smoke and meat powder can't explain why I can do
7 it. Somehow, something in this part of the brain. Frontal
8 lobes of the brain is causing some kind of a chemical
9 reaction that is affecting the nerves, which is affecting
10 the muscles and my finger is moving.

11 In the long run and it's a philosophical position,
12 when we know all there is to know, I have a hunch that an
13 awful lot of our behavior, maybe all of it will be reduced
14 to a study of neurons and chemistry and however nerves and
15 brains and muscles work.

16 In the end it will be that. That was my point.
17 That is why on the next page I thought to myself, I was some
18 glad, I said this is my own layman's philosophical position.
19 I don't know anything about the field, but as a layman, that
20 is what I think.

21 Q You think all consumer behavior will eventually be
22 explained in terms of addiction?

23 A No, I didn't say addiction. I said neurological
24 responses and chemistry and at some level that is far more
25 anatomic level rather than the gross level, rather than

P1T 003047

1 anthropology or sociology. I am speaking against myself, I
2 think, in terms of social psychology. A hundred years from
3 now, goodness, who knows.

4 Q When you gave that testimony, had you reviewed the work
5 of Dr. Dunn performed at Philip Morris?

6 A No. I had -- I then never heard of Dr. Dunn. The only
7 time I talked about Dr. Dunn was when you talked about him
8 in the deposition. I don't know who he is.

9 Q You didn't review any research at Philip Morris
10 concerning their investigation in the field of consumer
11 behavior and cigarette smoking?

12 A No. I don't know if it exists. I never heard of it.
13 The only Dunn I know is a guy who has written an advertising
14 textbook.

15 Q Sorry?

16 A There is a fellow Dunn who wrote a textbook in
17 advertising. That is the only one I read.

18 Q In terms of your statement on Page 117 on addiction that
19 was one of the subjects you discussed with Mr. Bleakley for
20 preparation of your testimony at trial?

21 A We didn't discuss the cross-examination at all.

22 Q You didn't discuss the deposition at all?

23 A We discussed the deposition at points.

24 Q You didn't discuss addiction?

25 A It wasn't Bleakley. Somebody said somewhere along the

P1T 003048

1 line, do you really believe in the physiology stuff and I
2 said, yes. Told them what I tried to tell you. That as a
3 layman, in the long run, somehow, some way, it is going to
4 be reduced to nerves and muscles, who knows how. If I only
5 knew how, I would really become famous and get a Nobel Prize
6 and go home.

7 Q Professor, you testified in numerous civil matters, is
8 that correct?

9 A Some. Numerous.

10 Q It's on your resume. It says numerous.

11 A When you add them all up. Because I have consulted -- I
12 have it here. I consulted with several governmental
13 agencies.

14 Q Just talking about civil litigation matters, sir.

15 A I said numerous.

16 Q I thought you did.

17 A Well, I exaggerate. I guess it is some.

18 Q You testified in one or two cases a year, is that fair
19 to say?

20 A No. It's less than that. Maybe once, some years two,
21 some years less, none. Somebody will call me and I will
22 talk to them a bit and have a little consulting job. But a
23 lot of those don't go to trial. Sometimes it ends after a
24 conversation. Sometimes it is a deposition and sometimes it
25 goes to trial but mostly they don't go to trial.

P1T 003049

1 MR. EDELL: No further questions.

2 THE COURT: Redirect, Mr. Bleakley.

3 MR. BLEAKLEY: Yes, your Honor.

4

5 REDIRECT EXAMINATION

6 BY MR. BLEAKLEY:

7 Q Dr. Kassarjian, I want to ask you a couple of questions
8 about the article entitled, Cognitive Dissonance and
9 Consumer Behavior that you authored with Dr. Joel Cohen.

10 Do you remember that?

11 A Yes.

12 Q Now, in what year did you and Dr. Cohen author this
13 argument -- I mean this article?

14 A It was 1964. It was the second semester, so about 1964.

15 I was teaching a class and Professor Cohen was my
16 research assistant and we were thinking of a project for the
17 students to do, and just about that time, the Surgeon
18 General's Report came out, and we thought that would be a
19 wonderful topic because it was in the newspapers and there
20 was lots of publicity on it, and the television and radio
21 was talking about it, so we thought that would be a
22 wonderful vehicle.

23 Q So how much time had lapsed between the issuance of the
24 Surgeon General's report and the time that you and Dr. Cohen
25 authored this article?

P1T 003050

1 A Well, do you mean collect data or actually author?

2 We collected the data very soon after. It may say in there.

3 Unfortunately, I had a copy and the court reporter took it

4 and then said she would absolutely, positively return it and

5 she didn't absolutely, positively return it.

6 I am not too sure what I am looking for. Did we
7 say what day we went out in the field -- let me see if I can
8 find it.

9 April '64 it was collected. Now if we knew when
10 the Surgeon General's report came out and that was floating
11 around but that was probably February of '64. January of
12 '64.

13 Q You collected the data in the spring of '64?

14 A April, yes.

15 Q You and Dr. Cohen wrote the article?

16 A Right after. As soon as we processed the data we worked
17 on it that spring. Don't know if it went into the summer
18 but we sent it right out, because it came out in the fall of
19 '64 and journals tend to be fourteen or fifteen months
20 behind.

21 Q My question is this: Has anything happened since you
22 and Dr. Cohen wrote this article in 1964 that leads you to
23 question any of the conclusions that you and he drew about
24 the applicability of cognitive dissonance to cigarette
25 smoke. Has anything happened since then?

P1T 003051

1 A I hadn't paid much attention to it until the deposition
2 and then Mr. Edell pressed me very hard on if there was
3 anything in it I disagreed with, so I went over it rather
4 carefully, sort of carefully trying to find things I
5 disagreed with, so there were a few things. Some was rather
6 embarrassing. There was a one major one that really
7 bothered me a lot. It was on page 59, if I can find it.

8 Page 59 I said, we were talking about dissonance,
9 and dissonance remembers consistency of the various things
10 that we behave consistently. We had written, apparently a
11 majority of all smokers are too heavily committed to their
12 smoking behavior to be influenced by persuasive information,
13 no matter how strongly worded or impressively documented.

14 Q Has anything happened to make you question it?

15 A Yes. We were made fools of. Just a dopey dumb comment
16 because millions of people, tens of millions of people have
17 quit since then. So whatever has happened in the world,
18 behavior has changed.

19 We had said people are smokers -- smokers are so
20 heavily committed to their smoking they will not change,
21 communication, persuasive communication will not cause
22 change and by God these changed by the millions.

23 Q Anything else?

24 A Joel and I have a lot of egg on our face.

25 There was one other place where the theory of

P1T 003052

1 dissonance suggests that you avoid dangerous information.
2 If you are a smoker you will try to avoid medical
3 information, deny information about health, and Joel Cohen,
4 I think found an article by the American Cancer Society a
5 study that showed those people who name cancer as a
6 dangerous disease tended to expose themselves to the greater
7 degree than those not naming cancer.

8 That was threatening because it's saying, if you
9 think cancer is bad stuff you want to stay away from reading
10 cancer information but these people were reading it. We
11 spent several paragraphs wiggling out of that nasty piece of
12 data.

13 Kind of wiggle out of it and a few other things.
14 But the main one was having made what I feel is pretty much
15 of a fool of ourselves by saying behavior doesn't change and
16 being faced with the fact that 30, 40, 50 million people
17 quit smoking.

18 Q Let me ask you a couple of questions about the content
19 analysis performed by Dr. Pollay.

20 Do you recall that yesterday Mr. Edell asked you a
21 number of questions about your deposition testimony --

22 A Yes.

23 Q -- concerning the Pollay content analysis, remember
24 that?

25 A Yes.

P1T 003053

1 Q Let's me ask you: Have you had an opportunity to
2 reread your deposition and, in particular, your deposition
3 testimony about the Pollay content analysis?

4 A Yes, I read it.

5 Q How many pages of your deposition were devoted to the
6 Pollay content analysis?

7 A About 45 pages and sort of near the end and the topic
8 changed and we came back again and actually counsel had
9 them, so it was just about 50 pages. Just under 50 pages.

10 Q When you were questioned by Mr. Edell at your deposition
11 about the Pollay content analysis, would you summarize for
12 the Court and the jury what you told Mr. Edell during your
13 deposition about the Pollay content analysis?

14 A Well, yes. I felt that there was some technical
15 difficulties with it, but then all studies have some
16 problems. And there was a couple of -- one area that I was
17 fairly concerned with. I'm not sure it was a fatal flaw,
18 but there was one area which I felt was a little more
19 serious than just serious.

20 For example, one could pick on the selection of
21 magazines. He used the Time and Life -- not Life, Look and
22 Life. It was an interesting selection because it's pure
23 middle class magazine, but beyond that, it ceased
24 publication in the middle of the study. I would have picked
25 Time, maybe Good Housekeeping or several magazines that were

P1T 003054

1 a little more representative maybe and maybe a little bit
2 more -- that were still around. But -- that's a technical
3 thing that others may quibble about but I didn't think that
4 was fatal.

5 Our tendencies is to keep judges unknowledgeable.
6 When you're using subjects, you try very hard not to let the
7 subjects know what the study is about because you don't want
8 to have them bias the data. You don't want them to know
9 what's going on.

10 In this case Dr. Pollay very carefully warned the
11 judges what the study was about, what was going on, that
12 they could very well be hauled into high court, as he called
13 it, and questioned and examined. You know, just cued these
14 judges in a whole lot and that worries me because when
15 you've done that to a judge, you've scared them, things are
16 beginning to happen to you, you don't know how they're going
17 to be have. It's a bias, it's a bias that's there.

18 The bigger problem I think that he used in his
19 instructions he was using college students, mostly doctoral
20 students. And I estimated from his studies that they were
21 about something like 25 years old. Now, the fact that -- I
22 don't know, I'll get to, but about 25 years old.

23 Then he asked these judges to judge the ads and in
24 the instructions he said you're to judge these not by
25 today's regulatory climate or legal or moral standards of

P1T 003055

1 today, but to the standards of the time. So he was asking
2 judges that had not yet been born when the Surgeon General's
3 report came out, judges that had not yet been born when John
4 Kennedy had died, to judge ads not from the year 1986, '87
5 that they understood something about it, but to judge it
6 from the moral climate, the legal regulatory climate of the
7 1920s and 1930s and '40s and '60s and '70s and I think
8 that's a terrible task.

9 I just don't know what they did. How do you take a
10 25 year old and say, judge this ad as if you were living in
11 the year 1927? That bothered me. That bothered me a lot.

12 I don't know how fatal a flaw it is but it's a very
13 troublesome flaw. I don't know what to do with it.

14 Then there is some other technical details. He
15 used two judges and each judge only saw one category, so two
16 judges were involved with the health category or the scene
17 category and all they did was to go through ads and look for
18 health ads, which would tend to inflate those numbers.

19 My own method on that is to take judges and have
20 them take the ad and judge it across all categories, but
21 that's technical. I don't know how that is.

22 Some of his data also bothered me. He uses one
23 category called health category. He puts in there,
24 according to his instruction, anything that's got something
25 to do with health. It includes, I think, both what I call

P1T 003056

1 positive and negative health claims. For example, there may
2 be some ads that say, smoke our brand and you'll feel
3 better, it will put hair on your chest and it will make you
4 more macho and stronger. There may be some ads like that,
5 that I would call a health ad.

6 There are some ads that warn you of the dangers of
7 a product. For example, an ad that says, something to the
8 effect that our product has less tar and nicotine than
9 brands B, C and D. Although sounding like a health ad,
10 because it's talking about less tar, is also reminding the
11 reviewer that the product is dangerous. I mean, our product
12 has tar. Our product has nicotine but our product has a
13 little bit less of these bad gases and things than our
14 competitor's product and to me that's reminding the reader,
15 calling it negative health. It's reminding the reader that
16 cigarettes are not good for you. These are bad things. If
17 you must smoke, smoke our brand because ours is better than
18 the other guys but it's still reminding people of bad
19 health.

20 When you say there was some ads for, I think it's
21 Camels, that talked about the T-Zone, a million years ago.
22 It's better for the T-Zone, less irritating. We got a
23 number of these ads and Pollay would call these health ads.
24 And, yet, if you think about it, when you say our product is
25 less irritating to the T-Zone, what it's doing is reminding

P1T 003057

1 the viewer or anyhow that the product is a -- not dangerous
2 but a bad product. It ain't good for you folks. And that's
3 what the ad is doing over and over again. He's taking these
4 negative claims, what I'm calling negative health, and his
5 normal health claims and calling it health and so what we
6 get is an enormous increase in health ads over some periods.

7 One of the periods I remember, I don't have it in
8 front of me, was that period where the cigarettes were
9 advertising so much about tar and nicotine. So you had this
10 tremendous increase in health claims. Well, those aren't --
11 they're health claims but they're negative health claims.

12 Then somewhere else he combined it with scene, pure
13 scene and there was something else. Pure scene.

14 Q Bold, lively?

15 A And liveliness, yeah. Combined all those and tried to
16 talk about it. That doesn't bother me. You can combine
17 anything you want. You can combine apples and oranges and
18 so long as you call them fruit, that's no problem. It all
19 depends on how the interpretation was done and I'm bothered
20 a little bit about what was done with the study, how it was
21 interpreted later on by Professor Cohen.

22 But that's not what you asked.

23 No, there is one other problem here that --

24 Q One other problem with the Pollay content analysis are
25 you talking about?

P1T 003058

1 A It's the Pollay content analysis, it's a serious
2 problem. Unfortunately, Pollay threw away his data or it
3 wasn't available. I asked for it again and again. People
4 are asking me to judge this study and all I've got is his
5 numbers. I didn't have his work sheets, I didn't have the
6 interviewer sheets. There was no way for me to check his
7 data. There was no way I could look it over and say, you
8 know, you did this right, you did this wrong. What he's
9 saying is, you must trust me, here it is.

10 Q Why is that important?

11 A Well, first of all, it's kind of unprofessional. You
12 don't throw data away in case someone asks for it or wants
13 to do a reanalysis.

14 There are two kinds of research in this world and
15 with academic research in an article, when an article comes
16 in, I mean to edit, as Mr. Edell asked me in my deposition,
17 we don't ask for those results. As an editor I don't go and
18 ask an author to give me all his data. Because there is two
19 approaches to what I call a scientific approach and the
20 other one is the litigative or advocacy approach. I don't I
21 don't know which is the better approach.

22 In the scientific approach, you take a single
23 person, single researcher, he does his very best to collect
24 data in the most unbiased, fair manner possible. Then he
25 does his very best to write it in a very careful fashion

1 with footnotes and numbers and data and statistics. And
2 then we, as the reader or as society, assume him to be a
3 very honest man and we can trust everything he says.

4 Now, every once in awhile, it happens that someone
5 cheats, someone lies or hedges the data a little bit. When
6 that happens, we come down on that man very, very hard
7 because that completely destroys the system. And so we're
8 very hard on a person who cheats on his data. That's one
9 approach.

10 Another approach is what I called the advocacy
11 approach of the truth and that's a little different. The
12 advocacy approach says, in a sense, no person can be
13 completely unbiased. So let us take two people, one from
14 each side, and let them present the best possible case they
15 can. So one side will come up and present his view very
16 carefully culled, very carefully trimmed, paragraphs taken
17 out of sentences and sentences taken out of paragraphs and
18 so on, very carefully put together and presented to a third
19 party, which is a judge or a jury.

20 Then the other side will come and attack that
21 person and then will present their case and present their
22 side very carefully culled. And so in the litigative
23 approach we get two sides, each presenting data, each
24 presenting results, each presenting information from their
25 point of view. And the third party, the judge or a jury,

P1T 003060

1 listens to both sides and says, I know what the truth is,
2 the truth is this.

3 In the scientific method you get a single observer
4 saying this is the truth and believe me because I'm an
5 honest man. In the litigative approach, you say there are
6 two sides. When there are two sides, you must be able to --
7 you know that material has been -- potentially has been
8 culled out to present a case. So we must see everything.

9 In advocacy research or litigative research it's
10 terribly important to save everything, all the work sheets,
11 all the instructions, names, so that we can go and talk to
12 them. Did you really, really do this? It's terribly
13 important to be able to check up.

14 I don't think Pollay realized the difference and
15 apparently threw it away or at least never gave it --
16 allowed me to see it. I don't know how to judge this. This
17 is advocacy research. I want to check up on him and I
18 can't, I have nothing.

19 Q Did you state all of these criticisms during your
20 deposition by Mr. Edell?

21 A Oh, yes.

22 Q Now, let me ask you another question --

23 A Can I add one little thing?

24 Q Yes, of course.

25 A These are flaws and this litigation stuff is a

P1T

003061

1 particularly serious flaw but if we ignore all of that, it
2 isn't all that bad a study. I don't want to destroy this
3 man. It's an okay study. It's got a lot of problems with
4 it and this one especially is a problem, but it's all right.
5 You know, it's okay.

6 Q Is it okay in your judgment as an expert in consumer
7 behavior to use the content analysis that was performed by
8 Dr. Pollay as a basis for predicting the future behavior of
9 Rose Cipollone?

10 A No, that was a mistake.

11 MR. EDELL: We have gone through this before.

12 THE COURT: Sustained.

13 Q Let me move on, doctor.

14 A I didn't understand what happened.

15 THE COURT: Objection was sustained. Wait for the
16 next question.

17 THE WITNESS: Okay.

18 Q Dr. Kassarjian, Mr. Edell asked you some questions
19 yesterday and again this morning about the book by Wilke,
20 which I believe you said you recommended to some of your
21 students on occasion.

22 A Yes, good book.

23 Q You remember Mr. Edell asking you about an example, I
24 don't remember the precise details of it, but in which 90
25 percent of the people in the northeast don't eat meat for

P1T 003062

1 breakfast?

2 A Yes.

3 Q Remember that?

4 A Yes.

5 Q And he asked you if 90 percent of the people don't eat
6 meat for breakfast, why can't you predict that someone who
7 lives in the northeast, a particular person in the northeast
8 wouldn't eat meat tomorrow morning for breakfast?

9 MR. EDELL: Objection. That was not the question
10 posed. I also indicated the hypothetical person's
11 deposition was taken also.

12 MR. BLEAKLEY: The hypothetical's deposition is
13 taken.

14 THE COURT: You want to add that?

15 MR. BLEAKLEY: No, I don't want to add that. I
16 want Dr. Kassarjian to state in his own words what he
17 believes, if anything, was wrong with the analogy that Mr.
18 Edell asked you about yesterday from Wilke's book.

19 A Well, I mentioned then we're very good at post hoc
20 explanation; something happens we explain it very well. I
21 guess I just didn't finish it at the time.

22 What happens in a case like this, and this case
23 what it was was 90 percent of southerners, some group of
24 people, did not eat meat. We had an individual of that
25 group, can I now predict with 90 percent probability that

P1T 003063

1 that person will not eat meat? The answer is, no, we can't
2 do that and we can't put a probability on it for several
3 reasons.

4 Probability is a methodology, a mathematics, very
5 large numbers, in fact, infinite numbers. We can only use
6 statistics when we're talking very, very large numbers. We
7 can't use it on the single individual.

8 For example, I was thinking that what if this
9 person of this group, northerner, who eats meat 90 --
10 doesn't eat meat at all, whichever.

11 Q Ninety percent don't eat meat for breakfast.

12 A We don't know anything about him. We don't know a lot
13 of personal things about him. He may belong to a religion
14 and in that religion one must eat bacon every single morning
15 of everyday, 100 percent of the time this person eats meat
16 because he belongs to this weird religion that says you must
17 eat bacon.

18 Then we look at the numbers and statistics and we
19 would be wrong. We would say, probability is .99, 90
20 percent he wouldn't eat meat. When in fact the probability
21 is he will eat meat.

22 Q For that particular person?

23 A Yes.

24 So when we're talking about an individual, we need
25 enormous amounts of information. We can't use this kind of

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1 group information. We need to know about that person. Does
2 he also belong to a religion that says you must eat meat?
3 Does he also do this? Does he also do that? In our field
4 we cannot predict.

5 Q In the field of consumer behavior, which you and Dr.
6 Cohen are experts, is there any basis for predicting the
7 behavior of an individual specified person?

8 A I have never seen it done. I don't know how -- I have
9 seen it done, Cohen did it, but I don't know how he managed
10 it. I don't know how he brought that around to make a case
11 for that. - It just doesn't occur. It's not our field.

12 Q Let me ask you, Mr. Edell questioned you this morning
13 about the Marlboro man and the success of Marlboro
14 advertising.

15 Are you aware of any empirical evidence that
16 Marlboro advertising has made anyone smoke who otherwise
17 would not have smoked?

18 A Oh, no, no, no. That's not what it was about. It was
19 about whether you can change the image of a thing. No,
20 there is no evidence of that.

21 Q Are you aware of any empirical evidence that Marlboro
22 advertising has made anybody continue to smoke who would
23 otherwise have stopped smoking?

24 A No. We don't have that kind of data, we don't have that
25 kind of data.

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1 Q Are you aware of any empirical evidence that Virginia
2 Slims advertising made anyone smoke who would otherwise not
3 have smoked?

4 A No.

5 Q Are you aware of any empirical evidence that Virginia
6 Slims advertising made anyone smoke who would otherwise have
7 stopped smoking?

8 A No, we don't have evidence on anything -- on what
9 anybody would have done of that sort.

10 MR. BLEAKLEY: No further questions.

11 THE COURT: Mr. Edell, any recross?

12 MR. EDELL: Yes.

13 RECROSS-EXAMINATION

14 BY MR. EDELL:

15

16 Q Professor Kassarjian, we did spend a substantial amount
17 of time at your deposition talking about Professor Pollay's
18 content analysis and you told me about all these little
19 things that you thought were wrong and I turned to you and I
20 said --

21 MR. BLEAKLEY: Objection to the characterization of
22 the testimony, your Honor.

23 Q I asked you the following question, after listening to
24 the same thing that you told the jury: "Is there anything
25 that was done right in this study? -- I was amazed.

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1 You said, "ANSWER: Lots of things. This is a good
2 study. I'm not bitching about this study. It's okay. What
3 we're doing here is we are playing with piddley little
4 details about what he writes. I don't know what he says.
5 It doesn't add a damn thing to either side, I don't think.
6 I have no problem with this study."

7 Is that what you said?

8 A Yes, I said the same thing here. It's an okay study,
9 you know. Couple of screwy little things in it. Too big
10 screwy things, one is the instruction of the judges --

11 Q Is that what you said, sir?

12 MR. BLEAKLEY: Objection.

13 A Yes.

14 THE COURT: Wait, wait. The witness has answered
15 the question. The question was: Is that what he said? And
16 he answered it.

17 Q Then we started talking about your definition of
18 adversary research versus scientific research?

19 A Yes.

20 Q And you said that Professor Pollay didn't realize
21 that -- the difference between scientific research and
22 adversary research.

23 That's what you just told the jury, correct?

24 A I hope he didn't. I haven't asked him.

25 Q You know the difference between adversary research and

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1 scientific research and that's as a result of your years of
2 being an expert in litigation matters. Isn't that correct?

3 A Well, you see that study was pretty well guided by Joel
4 Cohen and I assure you Joel Cohen knows.

5 Q Is that correct, sir?

6 A Yes, that's correct.

7 Q But that's where you learned the difference between
8 adversary and scientific research?

9 A No, no no. That's just something I sat back one day and
10 was thinking and I thought and came up with approaches to
11 the truth. That's all. I was just wondering about whether
12 the scientific method gives us a better approach to what's
13 really the truth or the legal method, the legalistic method.
14 And concluded I don't know which is the better method. I
15 don't know.

16 Q Page two 44, line three: "QUESTION: Where did you come
17 up with this information? Did you learn it from a
18 scientific journal or from the employers you work with?

19 "ANSWER: That is my opinion on the differences
20 between advocacy research and scientific research.

21 "QUESTION: What do you base that on?

22 "ANSWER: I base that on my knowledge of both types
23 of research.

24 "QUESTION: Of being an expert in litigation matters
25 over the last ten to 15 years?

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1 "ANSWER: Yes."

2 A Fine.

3 MR. BLEAKLEY: Your Honor --

4 Q Is that correct, sir, that's where you learned advocacy
5 research, of being an expert in the last ten or 15 years?

6 A You know, I mean, I agree. I did all those things and
7 all of it added in. I didn't learn about any of this stuff.
8 I sat and I thought about it one day.

9 I think I also said these are the kinds of issues
10 one should discuss over a bottle of wine, didn't I?

11 Q No, you didn't say that?

12 A Oh, I didn't? Somewhere I said let's talk about this
13 over wine. philosophy always sounds more profound when you
14 have wine with it. It's just my opinion.

15 Q And people in the academic world who have not been
16 experts in litigation matters only know of one type of
17 research; scientific physical research. And you know very
18 well that Professor Pollay has never been an expert, never
19 testified as an expert, prior to his testifying in this
20 court?

21 A Oh, no, I didn't know that. But it was pretty clear
22 that he should have known, he should have known he would be
23 asked. Apparently he didn't have it. Cohen does know,

24 Q Did you attempt to duplicate this content analysis to
25 see whether or not there was anything really wrong with it?

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1 A That is not my responsibility. It is the author's
2 responsibility to present his data.

3 Q In fact, the advertisements that you told us about today
4 you don't even know whether they were part of the content
5 analysis, do you?

6 A No idea.

7 Q But you complained in the deposition that Professor
8 Pollay gave too much detail about how and what he went about
9 in doing the content analysis, isn't that correct, sir?

10 A Oh. No. That is different.

11 Q You didn't complain that he gave too many details?

12 A Do you -- yes, I did complain.

13 But do you really want me to mention what that
14 complaint was?

15 Q You talked about this hypothetical situation. When we
16 talked about these grits and that the person could have
17 religious beliefs that required them to have bacon, but if
18 you took the person's deposition and found out what they ate
19 for the last 50 years and asked if they had any religious
20 requirements that mandated that they had meat for breakfast,
21 and you knew they lived in the East their entire life and
22 their family lived in the East their entire life, then you
23 could make a prediction tomorrow morning more likely than
24 not, that tomorrow, when we went to breakfast, they wouldn't
25 have meat?

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1 A No. If this person has some adrenalin deficiencies
2 which requires excess salt in his system, we would not have
3 gotten that in deposition. He may not have known it
4 himself. But we know that he liked salt, salty things so
5 every chance he gets he licks bacon, eats bacon. This is
6 true.

7 There is one more thing, what is the adrenalin
8 like? Where does the salt deficiency business come from?
9 We have to know about his motivation, about his psyche.

10 We have to know everything and in the deposition
11 that doesn't come out. Often the person doesn't know some
12 of these things about themselves.

13 Q If you had all the medical records you would know?

14 A Okay. Then I will think of something else. The problem
15 is there is an infinite number of things out there. If I
16 mentioned salt you would say but I collected the adrenalin
17 records, if you say religious, but if I say something else
18 you say -- I asked something else and if we know everything
19 we asked -- we don't often do it.

20 Q When you made the statement in your deposition that you
21 could not predict or Joel Cohen could not predict more
22 likely than not Rose Cipollone would use the safer
23 cigarette, you had not even looked at Rose Cipollone's
24 deposition, had you?

25 A When I said it in deposition?

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1 Q Yes, sir.

2 A I said there was no way to predict what the individual
3 was going to do.

4 Q You had not looked at one volume of Rose Cipollone's,
5 let alone all four volumes?

6 A No. Nor had I looked at any psychological reports nor
7 talked to a psychoanalyst.

8 All I know there are so many things out there, that
9 in a deposition, especially under the tense conditions or
10 the court condition of a deposition, you are not going to
11 get the deep motivational parts of the individual,
12 probabilities are not.

13 Q You know Professor Cohen did review all four volumes
14 before he expressed that opinion of Rose's deposition?

15 A I must -- I don't know.

16 MR. EDELL: No further questions.

17 THE WITNESS: If he said so on his deposition. I
18 know it if he didn't say it in his deposition, I don't know
19 it.

20 MR. EDELL: No further questions.

21 MR. BLEAKLEY: No further questions.

22 THE COURT: Step down.

23 (Witness excused.)

24 MR. SIRRIDGE: I call Dr. Sheldon Sommers to the
25 stand.

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